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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY AND CITICORP,

Petitioners,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION

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BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION

INTEREST OF AMICUS CURIAE

The New York Clearing House Association (the "Clearing House") is an association of 12 leading commercial banks

located in New York City.[1] It operates electronic payment systems and clears commercial drafts and items in the New York area. In addition, it has filed briefs as *amicus curiae* in cases presenting significant general questions of law affecting banking in the United States.

Members of the Clearing House have a direct and vital interest in issues affecting interstate banking and in the proper interpretation of Federal banking statutes such as the Bank Holding Company Act. The Clearing House believes that the Connecticut and Massachusetts statutes at issue here impose an impermissible burden on interstate commerce, not authorized by Congress, in violation of the Commerce and Compact Clauses. The Clearing House believes that the views presented in this brief will provide assistance to the Court in its consideration of these issues.

CONSENT OF THE PARTIES

All parties to this action have consented to the filing of this brief. The written consent of each party has been filed with this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose and effect of the Connecticut and Massachusetts statutes is to exclude non-New England bank holding companies in order to protect New England commercial banking from competition. Such patent economic protectionism is impermissible under the Commerce Clause unless it has been unmistakably authorized by Congress. These state statutes were not authorized by Section 3(d) of the Bank Holding Company Act. Section 3(d) authorizes states to permit entry

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA and European American Bank & Trust Company.

by out-of-state bank holding companies, but that is all it authorizes. It is not a license to discriminate among the several states.

Moreover, no matter how broadly Section 3(d) is construed with respect to unilateral state action, it clearly does not authorize states to take *joint* action. Because agreements between states to enhance their power over interstate commerce are governed by the Compact Clause, the failure of Connecticut and Massachusetts to obtain Congressional approval for their joint action violates that Clause.

ARGUMENT

Analysis of the constitutionality of the Connecticut and Massachusetts statutes must, at the outset, be placed in the context of the fundamental policies they violate. A primary goal of the Framers of the Constitution was to ensure the free flow of commerce within the United States. This goal was accomplished principally through the inclusion in the Constitution of the Commerce Clause,[2] which prohibits state action that unreasonably burdens interstate commerce. Further, because joint state action poses special risks to the supremacy of the Federal government, the Compact Clause[3] requires Congressional consent to agreements between states that enhance their power over commerce.

The state of affairs before the adoption of the Constitution made clear the need for national regulation of commerce:

> "The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be

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[2] U.S. Const., art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States . . . ."

[3] U.S. Const., art. I, § 10, cl. 3: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

> forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination."[4]

This lack of Federal power over commerce and the "exercise of [that] power separately, by the States [had] not only proved abortive, but engendered rival, conflicting and angry regulations".[5] As Madison reported:

> "It seems to be feared that the Northern States will oppress the trade of the Southern. . . . The middle States may apprehend . . . combinations against them between the Eastern & Southern States . . . ." J. Madison, *supra* note 5, at 438-41.

In response to this problem, above all others, the Federal Convention of 1787 convened to draft a Constitution "adequate to the exigencies of government and the preservation of the Union".[6] The "one object riding over every other in the adoption of the Constitution" was thus "to keep the commercial intercourse among the States free from all invidious and partial restraints", *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 231 (1824), and "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation". *Hughes v. Oklahoma,* 441 U.S. 322, 325-26

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[4] *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 445-46 (1827).

[5] J. Madison, *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States* 11 (ed. Hunt & Brown 1920).

[6] Resolution of Congress, Feb. 21, 1787, in 1 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 120 (2d ed. 1866).

(1979).[7] The Commerce Clause and Compact Clause were adopted to prevent such "economic Balkanization".[8]

1. The Statutes Violate the Commerce Clause.

(a) The statutes impose an unreasonable burden on interstate commerce.

The Commerce Clause "by its own force, prohibits discrimination [by any state] against interstate commerce". *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, 185 (1938); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976). A state statute thus violates the Commerce Clause if it has a discriminatory purpose or discriminatory effect upon out-of-state firms or goods. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354

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[7] *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827):

> "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress."

See also The Federalist Papers No. 22, at 144 (Rossiter ed. 1961) (absent national regulation, the "interfering and unneighborly regulations of some States . . . would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy").

[8] *See Milk Control Board v. Eisenberg Farm Products Co.*, 306 U.S. 346, 351 (1939):

> "When the people declared 'The Congress shall have Power . . . To regulate Commerce . . . among the several States, . . .' their purpose was clear. The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to discriminate as between neighboring states in admitting articles produced therein."

(1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935).

Where a statute effects "simple economic protectionism, . . . a virtually *per se* rule of invalidity has been erected". *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (invalidating statute prohibiting use of waste landfill sites for waste collected outside state).[9] Were the law otherwise, "we [would be] brought back to the condition of things which existed before the adoption of the Constitution . . . ." *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 498 (1887).[10]

The statutes at issue[11] are plainly offensive to this Constitutional mandate. They are the product of unabashed economic protectionism directed against non-New England states. On their face, they allow out-of-state bank holding companies to acquire control of an in-state bank only if the princpal place of business of the acquiring holding company is in New England. The statutes' legislative histories make clear that they were avowedly designed to exclude "the big money

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[9] *Accord, Bacchus Imports, Ltd. v. Dias*, 104 S. Ct. 3049, 3055-57 (1984) (invalidating statute imposing excise tax on sale of liquor while excepting certain local products); *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535-39 (1949) (invalidating statute allowing denial of entry by out-of-state milk distributors if entry would "tend to a destructive competition" in local market); *Minnesota v. Barber*, 136 U.S. 313, 323-29 (1890) (invalidating statute that prohibited sale of meat of animals not inspected within state before being slaughtered).

[10] *See also Pennsylvania v. West Virginia*, 262 U.S. 553, 599 (1923):

> "[absent the Commerce Clause,] Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines."

[11] 1983 Conn. Act 83-411 (Reg. Sess.) (reprinted in the Appendix to the Petition for Certiorari [hereinafter "Pet. App."] at A97); Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (Pet. App. A101).

center banks"[12] in order "to give our banks . . . time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly can".[13]

That exclusionary device erects "an economic barrier protecting a major local industry" from competition from without the region and establishes "the mutiplication of preferential trade areas". *Dean Milk Co. v Madison,* 340 U.S. at 356. Such efforts "to suppress or mitigate the consequences of competition between the states" are precisely what the Commerce Clause forbids. *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 522 (1935); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 352 (1977); *see Brimmer v. Rebman,* 138 U.S. 78, 82 (1891) (state may not "make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States").

No constitutionally justifiable "local benefit" outweighs the burden these statutes place on interstate commerce. Indeed, the only claimed "local benefit" is the very economic protectionism that the Constitution prohibits. The purported interest of

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[12] *Enlivening Banking for Fun and Fireworks,* N.Y. Times, April 3, 1983, at F4, col. 2 (quoting Massachusetts State Senator Brennan) (Pet. App. A189).

[13] Conn. Sen. Debate at 64 (May 18, 1983) (Sen. Sullivan) (Pet. App. A159); *see also* Conn. House Debate at 259 (May 26, 1983) (Pet. App. A158) (Rep. Onorato: states pass regional laws to "protect what's theirs that's within their own state" before banks from other regions enter market); Mass. Joint Standing Comm. on Banks and Banking, Research Staff Summary at 1 (November 9, 1982) (Pet. App. A150) (bill's purpose is to establish "the necessary authority for a regional, New England banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority"); 70 Fed. Res. Bull. 374, 382 (1984) (Pet. App. A58) (approving merger of Bank of New England Corp. with CBT Corp.: "The discriminatory nature [of the Connecticut statute] is apparent from its legislative history, which demonstrates the intention of the Connecticut legislature to permit Connecticut banks and bank holding companies to develop and consolidate on a regional basis before having to compete with banks outside the region").

Connecticut and Massachusetts in "thwart[ing] any intervention as best we can from the large institutions" (Connecticut Senator Sullivan)[14] in an effort to avoid "stiffer competition" (Massachusetts Senator Brennan)[15] cannot be permitted under our Federal system of commerce:

> "In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 43-44 (1980).

(b) Section 3(d) of the Bank Holding Company Act does authorize the creation of regional banking systems.

Section 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1824(d), does not save these statutes. While Congress may at times "permit the states to regulate the commerce in a manner which would otherwise not be permissible", *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945), its intent to remove state legislation "from the reach of the dormant Commerce Clause . . . must be *unmistakably clear*". *South-Central Timber Development Inc. v. Wunnicke*, 104 S. Ct. 2237, 2242 (1984) (emphasis added). This is so because when state regulation affecting commerce

> " 'is of such a charter that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.' . . . On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. . . . A rule requiring a clear

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[14] Conn. Sen. Debate at 64 (May 18, 1983) (Pet App. A159).
[15] Conn. Sen. Debate at 15 (March 3, 1983) (Pet. App. A155).

expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.* at 2243.

This Court has repeatedly rejected the argument that Congress has authorized the imposition of a burden on interstate commerce by a state if there is any ambiguity as to that authorization. *E.g., South-Central Timber Development Inc. v. Wunnicke,* 104 S. Ct. 2237, 2240-43 (1984); *Sporhase v. Nebraska,* 458 U.S. 941, 958-60 (1982); *New England Power Co. v. New Hampshire,* 455 U.S. 331, 340-44 (1982); *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 44-49 (1980); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 379 (1964); *United States v. Public Utilities Commission,* 345 U.S. 295, 299-311 (1953); *see also Bacchus Imports, Ltd. v. Dias,* 104 S. Ct. 3049, 3057-59 (1984) (state liquor tax discriminating against interstate commerce not saved by 21st Amendment; although the amendment allows a state to exclude liquor entirely, it does not follow that the state is authorized to discriminate among its sister states if it chooses not to exclude all liquor).

It is, by contrast, only when Congress has spoken with unambiguous precision that this Court will find burdensome state regulation to have been sanctioned. *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 414 n.17 (1983) (Senate Conference Report states that "the Congress . . . is ceding its authority under the commerce clause of the Constitution . . . to affected States"); *Western & Southern Life Insurance Co. v. State Board of Equalization,* 451 U.S. 648, 653-55 (1981) (federal statute provides that state regulation of taxation of insurance business "is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"); *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 427-29 (1946) (same).

Section 3(d) of the Bank Holding Company Act does not authorize Massachusetts and Connecticut to form a regional

banking system or to discriminate against the bank holding companies of particular states—much less authorize such action with "unmistakable" clarity. That section merely provides:

> ". . . no application [to the Federal Reserve Board of Governors] . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries are principally conducted . . . *unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication*". 12 U.S.C. § 1842(d) (1984) (emphasis added).

This language plainly allows individual states to permit the acquisition of in-state banks by out-of-state bank holding companies. It does not with "unmistakable" clarity grant states the right to discriminate among their sister states.[16] As the Federal Reserve Board of Governors recognized, Section 3(d)

> "does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states. . . . [This language]

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[16] States may effectively continue the federal prohibition on acquisition of state banks by out-of-state bank holding companies by declining to pass legislation that would allow entry by such holding companies. But, such power to exclude, without more, does not carry with it the power to discriminate. States may not "use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution". *Looney v. Crane Co.*, 245 U.S. 178, 188 (1917); *accord, Herndon v. Chicago, Rock Island and Pacific Railway Co.*, 218 U.S. 135, 158-59 (1910); *cf. Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 657-58 (1981) ("a State may not impose *unconstitutional* conditions on the grant of a privilege") (emphasis in original).

does not appear to meet the stringent test of explicitness laid down by the Supreme Court." 70 Fed. Res. Bull. 374, 384 (1984) (Pet. App. A65) (emphasis in original).[17]

Nor does the section's legislative history evince a Congressional contemplation and acceptance of the regional parochialism of the statutes at issue. Section 3(d) was introduced by Senator Douglas as an amendment to the Bank Holding

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[17] Having stated the proper standard, the Board proceeded to apply a totally different one. In essence, the Board required the protestants to establish with unmistakable clarity that Section 3(d) did *not* authorize the challenged statutes. While acknowledging that the issue of authorization was not "free from doubt", the Board relied on the "principle of statutory construction that legislatures are presumed to have acted within constitutional limits", and decided to hold the Connecticut and Massachusetts statutes constitutional unless shown "clear and unequivocal" evidence to the contrary. *Id.* at 376-77 (Pet. App. A40-41) (approving merger of Bank of New England Corp. and CBT Corp.); *accord,* 70 Fed. Res. Bull. 524, 525-26 (1984) (Pet. App. A83) (approving merger of Bank of Boston Corp. and Colonial Bancorp, Inc.); 70 Fed. Res. Bull. 353, 354 (1984) (Pet. App. A74) (approving merger of Hartford National Corp. and Arltru Bancorporation). Applying this erroneous standard, the Board read Section 3(d) broadly and found the challenged statutes constitutional.

The Board's error was compounded by the Court of Appeals for the Second Circuit which not only failed to correct the mistake, but gave "substantial deference" to the Board's "finding". *Northeast Bancorp, Inc. v. Board of Governors,* 740 F.2d 203, 207-08 (2d Cir. 1984) (Pet App. A29). The Second Circuit purported to be deferring solely to the Board's statutory interpretation but, as shown above, this interpretation was based upon a misapprehension of the constitutional standard for interpreting statutes that are argued to have delegated Congress' power over commerce. The Second Circuit's opinion can thus be entitled to little or no weight. Indeed, even if the Federal Reserve Board should apply such a standard because it is an administrative agency and not a court, deference upon judicial review constituted an impermissible abdication of the Court of Appeal's duty, under Article III of the Constitution, independently to decide issues of constitutional law. *Crowell v. Benson,* 285 U.S. 22, 60 (1932); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176 (1803); *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 63-70 (1982) (Brennan, J.). At the very least, therefore, this Court should remand to the Court of Appeals with instructions to apply the proper standard of review.

Company Act then under consideration, and passed during a floor debate. It was given no interpretation or analysis by the collective body of Congress.

As the Federal respondent concedes,

> "The sparse legislative history of the Douglas Amendment does not directly address the question whether Congress intended to authorize the creation of regional banking arrangements, and therefore does little to illuminate the meaning of the statutory language. . . . [*T*]*here was no congressional discussion of the specific types of action that the states might or might not take under the Douglas Amendment.*" Brief for the Federal Respondent in Opposition to the Petition for Certiorari at 6 (emphasis added).[18]

The sole references in the legislative history to the power of states over out-of-state bank holding companies do not, with "unmistakable" clarity, authorize the discrimination among states here at issue. On the contrary, they consist

> "in large part of conclusory statements by Senator Douglas to the effect that his Amendment would 'permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them' ([102 Cong. Rec.] at 6858 [1956]), would 'prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so' (*id.* at 6859), or would leave room for the exercise of 'State policy' in the banking field (*id.* at 6860)". *Id.*

This Court has warned against "[r]eliance on such isolated fragments of legislative history". *New England Power Co. v.*

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[18] *See also* 70 Fed. Res. Bull. 374, 385 (1984) (Pet. App. A66) (there was "no discussion [in Congress] of the power of the states to discriminate among potential out-of-state entrants"); *Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288, 1296 (D.C. Cir.) ("Not once in the entire debate is the discrimination question raised"), *cert. denied,* 423 U.S. 875 (1975).

New Hampshire, 455 U.S. 331, 342 (1982).[19] Courts may not rewrite legislation "based on mere speculation as to what Congress 'probably had in mind' ", *id.* at 343—and nothing could be more improbable than that Congress, without any discussion, intended to authorize the Balkanization of commerical banking.[20] Absent clear Congressional intent[21] to sustain otherwise discriminatory state regulation of interstate commerce, Section 3(d) cannot be interpreted as authorization for the statutes in question.

2. **The Statutes Violate the Compact Clause.**

The Constitution also bars the discrimination effected by the Connecticut and Massachusetts statutes because it is accomplished through an agreement between states. The Compact Clause prohibits, absent Congressional consent, agreements among the states

> "which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects

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[19] *See also Garcia v. United States,* 105 S. Ct. 479, 483 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the committee reports on the bill . . . . We have eschewed reliance on the passing comments of one member . . . and casual statements from the floor debates"); *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979) ("[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"); *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 396 (1951) (Jackson, J., concurring) (to "select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its most important functions").

[20] The only results of Section 3(d) which appear to have been anticipated by Congress were "an absolute prohibition against future expansion by bank holding companies", 102 Cong. Rec. at 6,861 (statement of Senator Bricker), and a "freez[e of] the banking system of America". *Id.* (statement of Senator Douglas).

[21] This Court has previously observed that the intent behind Section 3(d) is not clear: "it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities". *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 47 (1980).

placed under their entire control". *Virginia* v. *Tennessee,* 148 U.S. 503, 517-18 (1893).[22]

In *U.S. Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978), This Court made clear that agreements which "enhance[ ] state power with respect to commerce", *id.* at 475, comprise one class of agreements that meet this standard and are therefore subject to the consent requirement of the Compact Clause. The Court in *U.S. Steel* explained that the Compact Clause applies when two states obtain by joint action power over interstate commerce that neither could have obtained alone. *Id.* The statutes at issue, in creating a regional banking system, manifest exactly an exercise of such power.

It cannot be seriously argued that the agreement between New England states to create a regional banking system does not enhance the power of the states with respect to commerce beyond that of any of the states acting alone. The admitted purpose of each statute is to foster the growth of New England banks and to increase their power in anticipation of broader competition. As Massachusetts Senator Brennan testified before the Connecticut legislature:

> "I welcome the opportunity to share with you some of our ideas and concepts that grew up and developed and evolved over the so called regional or New England Regional Experimental Banking Network, if you will . . . . I think it is advisable for a region such as ours, a region that has a tradition of cooperativeness, a region that has a tradition of regional pride, Mr. Chairman, to get up and get going in terms of providing the banking institutions within this region whoever had a tradition and a concern

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[22] All agreements, formal or informal, including those reached through reciprocal legislation, are within the scope of the Clause. *U.S. Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452, 470-71 (1978); *see Virginia v. Tennessee,* 148 U.S. at 517-518. That the statutes here at issue constitute an agreement is made clear by the fact that, as the Federal Reserve Board of Governors found, Connecticut, Massachusetts, and other New England states worked closely together prior to the statutes' enactment "to discuss regional interstate banking" in an "effort to create a regional banking zone". 70 Fed. Res. Bull. 374, 380 (1984) (Pet. App. A51).

> for the stability and the vitality and the economic health of this region. Provide those entities with a testing ground for a freak [sic] period of time, so that they will have an opportunity to be in a healthier situation, they'll have an opportunity to accustom themselves, if you will, to the rigas [sic] of interstate banking, before they have to go head on head with the stiffer competition on a national basis . . . ." Conn. Sen. Debate at 14-15 (March 3, 1983) (Pet. App. A153, A155).

Senator Sullivan of the Connecticut Senate likewise made this clear:

> "what the committee did and in what we consider our wisdom was to come forth with a measure which would follow the Massachusetts bill that has passed which is a New England pact and to follow the Rhode Island pact to the extent that they have formed a, or passed a statute restricting it to New England even though they have a trigger mechanism in 1986, I think it is, which that law has passed the legislature in Rhode Island. [W]e've come up with the measure to create a New England banking law . . . ." Conn. Sen. Debate at 61 (May 18, 1983) (Attachment A at 2).

And, as Representative Gilligan explained in urging that the Connecticut statute be effective immediately:

> "There's everything to be gained by seizing the opportunity of getting out into the market and permitting ourselves to participate along with Massachusetts in mutually advantageous mergers to buttress the position of the local banking industry for the survival test they'll face in the very near future." Conn. House Debate at 288 (May 26, 1983) (Attachment B)

No state by itself could create a regional banking system populated by the large financial institutions that will exist if the acquisitions challenged in this case are consummated. It is only joint action by New England states that can enhance the power

of that region over interstate banking. Such joint action, however, must be approved by Congress pursuant to the Compact Clause. No such approval has been obtained.

The Bank Holding Company Act does not say anything about *joint* action among the states. In those cases where this Court has found the requisite Congressional consent under the Compact Clause, there has consistently been a clear expression of intent to approve *joint* action. *E.g., Cuyler v. Adams,* 449 U.S. 433, 441 (1981); *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 277 (1959); *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 25 (1951). Nothing in the text or legislative history of Section 3(d) suggests that in 1956 Congress even considered, much less approved, the possibility of joint action.

Finally, the suggestion of the Court below that the agreement between Connecticut and Massachusetts would not violate the Compact Clause because

> "if at any time Congress should find any encroachment [on Federal Supremacy], it could remove the encroachment by appropriate legislation", 740 F.2d at 209 (Pet. App. A32),

turns the application of the Compact Clause on its head. If that were true, no agreement between the states could violate the Compact Clause. The Compact Clause, of its own force, expressly requires states to obtain the assent of Congress—it does not require Congress to be constantly vigilant for state encroachments on Federal supremacy. *See Cuyler v. Adams,* 449 U.S. at 439 ("the requirement of congressional consent is at the heart of the Compact Clause").

The agreement at issue enhances the power of Connecticut and Massachusetts over interstate commerce, and has not received Congressional consent. It therefore violates the Compact Clause.

CONCLUSION

The Federal system of the United States requires that Congress approve restrictions on commerce such as those in the Connecticut and Massachusetts statutes. The Congress that enacted Section 3(d) did not consider the creation of regional banking systems. Such a major reorganization of the nation's banking structure should be left to explicit Congressional approval—if that can be obtained—and not to the parochial efforts of the several states.

Respectfully submitted,

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ATTACHMENT A

Connecticut Senate Debate at 60—64
(May 18, 1983)
(remarks of Senator Sullivan)

"Mr. President, before I explain the amendment, I'd like to point out to the circle that this is probably the most significant banking legislation that's come before this body, at least in my time anyway, and Mr. President, it is the result of many of the activities in the Congress, many of the reports, Presedential [sic] reports, sent to the Congress and some of the actions of the Congress more particularly the banking committee and the Congress of the United States wherein they've left banking interstate up to the states, more or less, or regions, and the reason for this, Mr. President, was that the Congress in its wisdom saw the great harm that it could do to banking and the financial industries in this country were they to pass some all-sweeping legislation in regard to opening up banking throughout the United States wide open. Some of the reasons for this, Mr. President, were more particularly the case here in the New England region where we are contiguous to big financial centers in New York where some of the banks in New York dwarf us—make our banking institutions look like midgets. Some of them like City Corps, which is probably a hundred twenty-two or a hundred and twenty-three billion dollars as compared to our largest bank in Connecticut which is something in excess of five billion. If you were to put all of our banks together, Mr. President, all of them together including savings and loans, mutuals, trust companies including credit unions, we probably would be twentieth or twenty-first in the list in the financial picture in New York, so that gives the circle an idea of how large the banking center in New York is, and to open our doors up completely throughout the United States would reek [sic] havoc, at least in the Committee's eyes, on the financial institutions of Connecticut. New England is peculiar in that it has probably one of the strongest mutual savings bank industries in the country. There are not too many mutual savings

banks throughout the country. In certain regions there are, but most of them are concentrated here in New England and they're a very strong and viable industry, and to just open the doors up and submit them to the onslaught of the big banks throughout the country including California, New York, etc., Chicago, would reek [sic] havoc on the industry, so what the committee did and in what we consider our wisdom was to come forth with a measure which would follow the Massachusetts bill that has passed which is a New England pact and to follow the Rhode Island pact to the extent that they have formed a, or passed a statute restricting it to New England even though they have a trigger mechanism in 1986, I think it is, which that law has passed the legislature in Rhode Island. we've come up with the measure to create a New England banking law whereas any of our institutions here in Connecticut, that is mutual savings and loans and trust companies, can acquire banks in any other New England state that has similar provisions in the law of their states as ours and vice versa, those banks can come into Connecticut and acquire our banks. Our law allows a mutual, or I mean a Connecticut Savings and Loan Association to acquire a New England Savings and Loan Association but the resulting bank will be a savings and loan association. Our law allows a Connecticut Mutual Savings Bank to acquire a New England Mutual Savings Bank or a Trust Company or a Savings and Loan Association and the resulting bank will be a mutual savings bank. Our law also allows, within the State of Connecticut, for the acquisition of a trust company or a savings and loan association by a mutual savings bank and the resulting institution will be a mutual savings bank. It also at the same time allows a merger between these various institutions stock institutions which we a couple of days ago passed a stock conversion bill for savings and loan and mutual savings banks. It allows stock institutions to merge and at the time of merger, they must indicate what type of institution will be the resulting entity which could be a trust company or a savings bank or a savings and loan association. Our law also gives the commissioner vast latitude in approving these various mergers and

purchases of assets or stock, and so the commissioner will be looking very closely at the merger that it is to take place. That's in regard to financial stability of the institution that's going to affect the merger. The commissioner also has the power to overlook the mergers of our various banking institutions within the State of Connecticut. If these terms seem boring, I have to keep mentioning them because we have these distinct banking institutions in Connecticut, that is mutual savings and loan associations and Connecticut Bank and Trust Companies who all have different powers and all these powers are granted by the State of Connecticut through statute or in the case of Federals, granted by Federal or regulation. Our law also prevents any other out-of-state bank from coming into Connecticut other than a New England Bank who has comparable law to ours, so it strictly forbids any of our banks within our state from acquiring any out-of-state bank other than a New England. It strictly forbids any New England bank from acquiring a Connecticut bank and then being acquired by an out-of-state bank outside of New England. In a case where this happens, the commissioner in Connecticut can issue a cease and desist order from that bank doing business in Connecticut. Our law also, the law that I'm putting forth today, also has provided for two out-of-state, by out-of-state I mean two banks anywhere in the United States, banks or bank holding companies, to establish two night depository offices per year in Connecticut and this is not cumulative. They may establish two per year. If they don't establish the two, then they fall by the wayside and they've got two to next year. Our law also prevents the leapfrogging provision for, as I say, a New York bank going into Maine and acquiring a Maine bank and having the Maine bank come in and acquire a Connecticut bank. The law prevents that from happening. Now, Mr. President, we spent long, hard hours thrashing out this piece of legislation and it had a majority support of the committee, not the unanimous support but the majority support, and that's indicative of the various views that were put forth in the committee during the promulgation of this legislation, and Mr. President, I want to commend the committee for the long, hard hours they put into listening to

various testimony in regards to this and, Mr. President, the main reason for this New England position is that if we were to open the doors up a big bank, and I mentioned these various banks, a large bank with a hundred billion dollar asset, could come into Connecticut and pick up two or three or four or five banks or four banks or three banks and then bring their entire marketing operation into Connecticut and a bank that size could overwhelm almost any bank we have here right now. So, Mr. President, we thought that to give our banks in Connecticut time to gird for the eventual coming of wide-open interstate banking, which I have no doubt is going to come, when, I'm not sure about that, but I know in the future it will come, in order to give our banks in Connecticut time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly can so we can thwart any intervention as best we can from the large institutions and still provide the service, the loan power of the banks that we have in Connecticut today to our Connecticut consumers. As we know, many of the large New York banks have great, great investments in foreign countries and so there's a fear that they would come into Connecticut, get our deposits and invest them in foreign countries, so we've tried to the best of our ability to prevent this from happening and the result is the New England Bank, and, Mr. President, I would move adoption of this amendment and I hope it would be unanimous and I would ask for a roll call vote, Mr. President."

ATTACHMENT B

Connecticut House Debate at 287-88
(May 26, 1983)
(remarks of Representative Gilligan)

"Mr. Speaker, I rise in opposition to the amendment [that would postpone the effective date of the statute until July 1, 1984]. And I had the privilege of serving on the HEB commission and it's not quite as complicated as it would seem. What we're really addressing this afternoon is an opportunity. And the question is whether we're going to seize that opportunity this afternoon.

"There is absolutely nothing to be gained by putting this off for one year. There's everything to be gained by seizing the opportunity of getting out into the market and permitting ourselves to participate along with Massachusetts in mutually advantageous mergers to buttress the position of the local banking industry for the survival test they'll face in the very near future.

"We can't stop the forces of change, but we can manage them and we can control them and we can guide them in a way that will strengthen our local banking industry. I see absolutely nothing to be gained by delaying this until 1984. Rhode Island admittedly decided to make it effective July 1, 1984, I believe. But I see every opportunity gained by acting immediately on this issue and giving Connecticut a competitive edge.

"I don't know why anyone in this Chamber would feel otherwise. I urge rejection of the amendment."